IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Continental Resources, Inc., Plaintiff and Appellant, vs. North Dakota Department of Health, Defendant and Appellee.	Supreme Court No. 20190087 Burleigh County District Court Civil Case No. 08-2018-CV-02160 **ORAL ARGUMENT REQUESTED**

Appeal from Judgment dated January 16, 2019
Case No. 08-2018-CV-02160
County of Burleigh, South Central Judicial District
The Honorable Bruce A. Romanick, Presiding

BRIEF OF APPELLANTS CONTINENTAL RESOURCES, INC.

FREDRIKSON & BYRON, P.A.

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com

– and –

BRACEWELL LLP

Jason B. Hutt
2001 M Street NW, Suite 900
Washington, D.C. 20036
Telephone: (202) 828-5850
jason.hutt@bracewell.com

Matthew G. Paulson
111 Congress Ave., Suite 2300
Austin, Texas 78701-4061
Telephone: (512) 494-3659
matthew.paulson@bracewell.com

Attorneys for Plaintiff and Appellant, Continental Resources Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Session Laws

Statutes

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the Court erred in finding that the United States Environmental Protection Agency was an indispensable party pursuant to N.D.R.Civ.P. 19 and N.D.C.C. § 32-23-11 where no challenge to the State Implementation Plan approval was alleged.

[¶ 2] Whether the Court erred in finding that it lacked subject matter jurisdiction pursuant Section 307(b)(l) of the Federal Clean Air Act when the action sought only the Court's interpretation of a state regulation.

[¶ 3] Whether the Court erred in finding that Continental Resources, Inc.'s action for declaratory judgment was not ripe for judicial determination, despite Continental Resources, Inc.'s good faith allegation that the seeds of a controversy exist at over 1000 facilities.

STATEMENT OF THE CASE

[¶ 4] Plaintiff/Appellant Continental Resources, Inc. ("CLR") appeals the District Court's dismissal of CLR's declaratory judgment action against Defendant/Appellee North Dakota Department of Health ("Department" or NDDH"). In dispute is the proper legal interpretation of N.D. Admin. Code § 33-15-07-02(1). The text, intent, and context of § 33-15-07-02(1) are simple – the regulation prohibits uncontrolled emissions. Facilities with the potential to emit organic compounds into the air must have emissions control devices installed unless they are excepted from the requirement by the Department. But nothing within the regulation requires perfect, leakless technology. Such technology does not exist and compliance with such a legal standard would be impossible. Other regulations within the State's air pollution rules specifically address and set standards for control of "fugitive emissions" that may escape from systems equipped with emissions control devices.

[¶ 5] After several decades of interpreting § 33-15-07-02(1) consistently with its language, intent, and context within the framework of the State's air pollution control regulations, the Department abruptly departed from this interpretation. The Department began threatening oil and gas operators, including CLR, with enforcement actions premised on the notion that the mere observation of a leak at a facility with an operating emissions control device constitutes a violation of § 33-15-07-02(1). The Department issued Notices of Violation ("NOVs") to CLR and other operators premised on this zero-emissions, leakless technology interpretation. Yet the Department also delayed moving forward with any administrative action that would allow operators to effectively challenge its new legal interpretation, instead piling on more and more NOVs seeking to force CLR and other operators to agree to settlements that included actions well beyond the Department's regulatory authority. Some of the other operators acquiesced to this extraordinary usurpation of agency power; CLR did not. CLR's NOVs remain pending, but the Department continues to refuse to commence prosecution. The Department's interpretation of § 33-15-07-02(1) cannot withstand judicial scrutiny.

[¶ 6] CLR filed the underlying action for declaratory judgment pursuant to N.D.C.C. ch. 32-23. No change to the statute or regulations is at issue. CLR sought the Court's declaration that if an approved control device is installed and operating at an oil and gas production facility, the mere presence of an emission from a closed tank hatch or control device does not, in and of itself, establish a violation of N.D. Admin. Code § 33-15-07-02(1). CLR brought the action against the Department because the Department's issuance of NOVs to CLR (and other oil and gas producers) based on its new, zero-emissions interpretation of § 33-15-07-02(1) exposes CLR (and others) to significant legal liability at thousands of well sites across North Dakota.

[¶ 7] CLR's declaratory judgment action was filed on August 20, 2018. On September 24, 2018, the Department moved to dismiss the complaint under N.D.R.Civ.P. 12(b)(1), (b)(6), and (b)(7) and 19. The Department argued, among other things, that the state district court lacked jurisdiction to review the legal interpretation of a state regulation authorized by a state statute and applied by a state agency. The district court heard argument on December 3, 2018. On January 08, 2019, the district court entered its Order Granting Defendant's Motion to Dismiss. Judgment was entered on January 17, 2019. On March 18, 2019, CLR timely filed its notice of appeal to this Court.

REQUEST FOR ORAL ARGUMENT

[¶ 8] Pursuant to N.D.R.App.P. 28(h), CLR requests oral argument in this case. Oral argument will be beneficial in facilitating the Court's understanding of the issues presented, key aspects of which are subject to de novo review. Furthermore, resolution of the important questions presented will have significant and widespread impacts on compliance obligations for operators in one of North Dakota's largest industries.

STATEMENT OF FACTS

[¶ 9] The Department is a North Dakota state agency. The Department's jurisdiction includes the administration and coordination of the state's air pollution control program. N.D.C.C. § 23-25-02; N.D. Admin. Code art. 33-15.[1] CLR is the

[1] Effective April 29, 2019, the North Dakota Department of Health Environmental Health Section will transfer authority for the administration and enforcement of environmental programs, including N.D. Admin. Code art. 33-15 pertaining to air quality regulations, to the newly created North Dakota Department of Environmental Quality ("NDDEQ"). *See* N.D. Sess. Laws ch. 199, §§2-74. The existing NDDH rules contained in N.D. Admin. Code Title 33 will be adopted, without substantive modification, as NDDEQ's rules in N.D. Admin. Code Title 33.1. All citations to the administrative code in this brief will refer to Title 33.

largest operator of oil and gas production facilities in North Dakota, operating more than 1600 facilities across the state. CLR's operations are subject to the air pollution control requirements of N.D.C.C. ch. 23-25 and N. D. Admin. Code art. 33-15.

[¶ 10] The state's air pollution control requirements contain certain foundational restrictions on potential sources of air pollution, i.e., open burning, sulfur compounds, vehicles and internal combustion, pesticides, and, applicable here, facilities with the potential to emit volatile organic compounds ("VOCs"). *See* N.D. Admin. Code §§ 33-15-02 through 33-15-10. N.D. Admin. Code § 33-15-07-02(1) (hereinafter referred to as the "Uncontrolled Emissions Regulation") prohibits the emission of VOCs from uncontrolled emissions sources not otherwise exempt from emission control requirements. N.D. Admin. Code § 33-15-07-02(1) states as follows:

> No person may cause or permit the emission of organic compounds gases and vapors, except from an emergency vapor blowdown system or emergency relief system, unless these gases and vapors are burned by flares, or an equally effective control device as approved by the department. Minor sources, as determined by the department and not subject to New Source Performance Standards (NSPS), may be granted exemptions to this subsection.

[¶ 11] The Department's historical interpretation of the Uncontrolled Emissions Regulation was consistent with this plain meaning. If emissions control equipment was installed and operating at a facility, or the facility was exempt from emissions control requirements, and VOC emissions occurred from a closed tank hatch or control device, the Department did not allege a violation of N.D. Admin. Code § 33-15-07-02(1).

[¶ 12] The Department's air pollution control rules are built upon the understanding that flares and other emissions control equipment are not leakless and cannot prevent all emissions. Compounds must be transported from the production facility to the flare or other emissions control device. While in transport, some very

small portion of the emissions inevitably escape from piping components (*e.g.*, seals on connectors, flanges, closed hatches, etc.). As a result, these emissions, known as "fugitive emissions," never reach the flare. Fugitive emissions that escape from controlled equipment are regulated under N.D. Admin. Code § 33-15-17-01 ("Restriction of Fugitive Emissions"), which requires that an operator take "reasonable" precautions to prevent such emissions:

> No person shall cause or permit fugitive emissions from any source whatsoever, including a building, its appurtenances, or a road, to be used, constructed, altered, repaired, or demolished; or activities such as loading, unloading, storing, handling, or transporting of materials without taking reasonable precautions to prevent such emissions from causing air pollution as defined in section 33-15-01-04.

N.D. Admin. Code § 33-15-17-01.

[¶ 13] Despite technological advances and improved LDAR practices, equipment that completely prevents fugitive emissions (referred to as "leakless" technology) does not currently exist. The Department has recognized this reality. (App. 155.) ("We also considered an equipment standard requiring installation of 'leakless' equipment. 'Leakless' equipment…is less likely to leak than standard equipment, but leaks may still develop….We could not identify any new 'leakless' technologies that could be applied in all applications. Therefore, requiring "leakless" equipment is not technically feasible, and this option was not considered to be [suitable].").

[¶ 14] CLR has been, and continues to be, a leader in industry efforts to reduce emissions and increase gas capture at oil and gas production facilities in North Dakota. CLR's leadership includes developing, implementing and continuing to enhance standard-setting programs for gas capture planning and leak detection and repair ("LDAR"). As part of these efforts, CLR ensures the use of best practices at its oil and gas production facilities to safely reduce emissions of volatile organic compounds ("VOCs"), including reduction of fugitive emissions.

[¶ 15] But without any rulemaking or other process to issue guidance, the Department has abandoned the rational and historical application of its Uncontrolled Emissions Regulation and co-existent fugitive emissions regulation. The Department now issues, but declines to prosecute, NOVs based on the mere presence of an emission from closed tank hatches and control devices, without regard to whether an approved control device was installed and operating. Short of suspending operations completely, these fugitive emissions are unavoidable because, as the Department itself recognizes, the leakless technology that would be required does not exist.

[¶ 16] At Oral Argument before the district court, counsel for the Department plainly confirmed the Department's position that any isolated leak would violate the Uncontrolled Emissions Rule. (App. 165.) Despite this interpretation, counsel acknowledged that a global consent decree—which has already been executed by the Department and several operators—permits those operators to emit up to 500 ppm. *Id.* ("**Would one isolated leak of less than 500 ppm technically be a violation of the rule? Yes.** But it would be like going 26 miles per hour in a 25 mile per hour zone. It's very much not significant.") (emphasis added). Thus, simultaneously, the Department has incorrectly interpreted the Uncontrolled Emissions Regulation to be a zero-emission standard and has executed legal agreements with operators permitting them to emit in excess of that zero-emission interpretation.

[¶ 17] The difference between a 0 ppm standard and a 500 ppm standard highlights the utility of CLR's requested declaratory relief. The mere presence of an emission from a closed tank hatch or control device would establish a violation of a 0 ppm standard. However, it would not establish a violation of a 500 ppm standard

without more, because the mere presence of an emission does not provide the quantification necessary to determine if the emission level is greater than, less than, or equal to 500 ppm.[2]

[¶ 18] The plain language of the regulation (and other related regulations, such as the fugitive emissions regulation) refutes the Department's interpretation. However, the Department has deprived CLR of the opportunity to challenge this flawed interpretation. While the Department has issued multiple NOVs alleging violations of the Uncontrolled Emissions Regulation—based solely on the mere presence of an emission from closed tank hatches or approved control devices, without regard to whether a control device is installed and operating—it has strategically caused the NOVs to hang over CLR rather than escalate the action to an administrative complaint. CLR's legal jeopardy will continue to increase as the Department continues to target CLR facilities for inspection.

[¶ 19] The legal jeopardy for CLR is already significant. As the largest oil and gas producer in North Dakota, CLR is responsible for ensuring compliance with Department air quality requirements at more than 1,600 production facilities. The Department's flawed interpretation places a cloud of uncertainty over the compliance status of each of these sites across the State. As a public company, CLR has an

---

[2] For example, the Department has issued NOVs based on the *observation* of emissions through optical gas imaging. The use of optical gas imaging, such as FLIR cameras, does not quantify emissions and thus cannot detect whether the level of emissions exceed a threshold. (App. 156.) ("...[I]nfrared camera technology is useful for inspections of volatile organic compound (VOC) emission sources....While these cameras can verify whether VOC losses from storage tanks are occurring, the FLIR cameras currently in use by EPA do not quantify the magnitude of the losses. Instead, inspectors use the camera to observe emissions and evaluate *potential* regulatory non-compliance. This process considers the infrared images as one element of the analysis.") (underlined emphasis added). Consequently, optical gas imaging is incapable of establishing a violation of a non-zero standard without additional analysis.

obligation to its shareholders to comply with the law and is required to frequently address in mandatory public filings the compliance status of its production facilities. CLR's interest continues to be prejudiced by the Department's abandonment of its historical application of the Uncontrolled Emissions Regulation.

[¶ 20] Accordingly, CLR brought the instant declaratory judgment action, not to challenge the existing NOVs, but to remove the underlying uncertainty that the Department's flawed interpretation has created. Specifically, CLR requested the district court to declare that if an approved control device is installed and operating at an oil and gas production facility, the mere presence of an emission from a closed tank hatch or control device does not, in and of itself, establish a violation of N.D. Admin. Code § 33-15-07-02(1).

LEGAL ARGUMENT

[¶ 21] The district court's dismissal of the declaratory judgment action was premature at the motion to dismiss stage and stemmed largely from a fundamental misinterpretation of the relief requested by CLR, as well as the United States Environmental Protection Agency's ("EPA") role (or lack thereof) in a dispute over implementation of the North Dakota air quality regulations. The following three issues are raised in this appeal:

[¶ 22] First, the district court erred in finding that EPA was a required and indispensable party pursuant to N.D.R.Civ. 19 and N.D.C.C. §32-23-11 because it failed to analyze whether EPA was an indispensable party and failed to evaluate CLR's requested relief in relation to EPA's interest.

[¶ 23] Second, the district court erred in finding that it lacked subject matter jurisdiction pursuant to §307(b)(1) of the Federal Clean Air Act ("FCAA") because it failed to apply its analysis to the relief actually requested by CLR.

[¶ 24] Third, the district court erred in dismissing CLR's claim for declaratory relief pursuant to N.D.R.Civ.P. 12(b)(6) because CLR's claim is both ripe and justiciable. CLR's claim is ripe and justiciable because it involves a purely legal question of regulatory interpretation and the court can render a judgment that will remove an uncertainty.

[¶ 25] For these reasons, CLR respectfully requests that the district court's Order Granting Defendant's Motion to Dismiss be reversed and that this action be remanded for further proceedings.

I. THE DISTRICT COURT ERRED IN FINDING THAT EPA WAS AN INDISPENSABLE PARTY PURSUANT TO N.D.R.CIV.P. 19 AND N.D.C.C. § 32-23-11 WHERE NO CHALLENGE TO THE SIP APPROVAL WAS ALLEGED.

[¶ 26] The district court erred in dismissing CLR's claim under North Dakota Rules of Civil Procedure Rules 12(b)(7) and 12(b)(6) for nonjoinder. In addition to the court's materially incomplete application of Rule 19, it also failed to evaluate CLR's requested relief in relation to EPA's interests under the State Implementation Plan ("SIP") framework and therefore erred in its conclusions.

[¶ 27] The court erred in its initial finding that that EPA was a required party because it failed to evaluate the nature of CLR's requested relief. Consequently, it erred in determining that such relief could not be accorded in EPA's absence.

[¶ 28] In addition, the district court failed to perform a complete analysis under N.D.R.Civ.P 12(b)(7) and therefore misapplied the law in dismissing the action for CLR's failure to join EPA. Even if EPA *was* a required party, as the court determined, the court ended its analysis without ever considering whether EPA is an *indispensable* party. As a federal agency, joinder of EPA is infeasible. As such, Rule 19 requires the court to find that EPA is both required and indispensable.

[¶ 29] Finally, the district court erred in dismissing CLR's claim under N.D.R.Civ.P. 12(b)(6) because it misconstrues the interests and the rights of EPA under the SIP framework.

[¶ 30] EPA cannot be joined in state actions due to the doctrine of sovereign immunity. Consequently, the district court's finding would mean that the interpretation of any state regulation included in a SIP is automatically precluded from review in state court. Congress has not vested the federal courts with such sweeping authority of review. *See* 42 U.S.C. § 7607(b)(1) (requiring only that petitions of review of the EPA Administrator's actions be filed in United States Circuit Courts). Nor does Rule 19 of the North Dakota Rules of Civil Procedure, which governs here, compel such a result. Instead, Rule 19 requires that the courts evaluate the interests of EPA in light of the requested relief to determine whether the court can accord complete relief among existing parties. *See Wacker Oil, Inc. v. Lone Tree Energy, Inc.*, 459 N.W.2d 381, 383 (N.D. 1990). The district court failed to perform this analysis and thus abused its discretion.

[¶ 31] Due to the egregiousness of the court's error in failing to even consider whether EPA was an indispensable party, CLR addresses that issue first in the legal argument below.

A. Standard of Review.

[¶ 32] CLR has structured its issues for appeal based on the district court's order. As such, this section addresses whether EPA must be joined under both N.D.R.Civ.P. Rule 19 (which the district court dismissed pursuant to N.D.R.Civ.P. 12(b)(7)) and N.D.C.C. § 32-23-11 (which the district court dismissed pursuant to N.D.R.Civ.P. 12(b)(6)). Both standards of review are addressed here.

12(b)(7) – Dismissal for failure to join an indispensable party

[¶ 33] A district court's decision on a motion to dismiss for failure to join an indispensable party is reviewed for an abuse of discretion. *See In the Matter of Estate of Murphy*, 554 N.W.2d 432, 438 (N.D. 1996); *Revoir v. Kansas Super Motels of North Dakota, Inc.,* 224 N.W.2d 549, 552 (N.D. 1974). "A district court abuses its discretion if it acts in an unreasonable, arbitrary, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned decision, or if it misinterprets or misapplies the law." *State v. Hammer*, 2010 ND 152, ¶ 26, 787 N.W.2d 716 (quoting *Citizens State Bank-Midwest v. Symington*, 2010 ND 56, ¶ 8 780 N.W.2d 676).

12(b)(6) - Dismissal for failure to state a claim

[¶ 34] A district court's dismissal of a complaint for failure to state a claim is reviewed de novo. *Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161*, 2011 ND 185, ¶ 6, 803 N.W.2d 827. In reviewing an appeal from a Rule 12(b) dismissal, the Court construes the complaint in the light most favorable to the plaintiff, taking as true the well-pleaded allegations in the complaint. *Burke v. North Dakota Dept. of Corr. & Rehab.*, 2000 ND 85, ¶ 4, 609 N.W.2d 729; *Perry Center Inc. v. Heitkamp*, 1998 ND 78, ¶ 42, 576 N.W.2d 505. Because determinations on the merits are generally preferred to dismissal on the pleadings, Rule 12(b)(vi) motions are viewed with disfavor. *Wells v. First Am. Bank W.*, 1999 ND 170, ¶ 7, 598 N.W.2d 834. Accordingly, a court's scrutiny of the pleadings should be deferential to the plaintiff and the complaint should not be dismissed unless "it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." *Lang v. Schafer*, 2000 ND 2, ¶ 7 603 N.W.2d 904. The Court will affirm a judgment dismissing a complaint for failure to state a claim if it cannot "discern a potential for proof to support it." *Ziegelmann v. DaimlerChrysler Corp.*, 2002 ND 134, ¶ 5, 649 N.W.2d 556 (quoting *Towne v. Dinius*, 1997 ND 125, ¶ 7, 565 N.W.2d 762).

B. Argument.

i. The District Court erred by finding that EPA was a required party under Rule 19(a), without also considering whether EPA is an indispensable party under Rule 19(b).

[¶ 35] In determining whether an action should be dismissed pursuant to 12(b)(7), N.D.R.Civ.P. 19 requires courts to perform three steps of analysis. First, the court must determine whether an absent party is required to be joined under Rule 19(a)(1)(A)-(B). N.D.R.Civ.P. 19(a)(1). Second, the court must assess whether joinder of the required and absent party is feasible. N.D.R.Civ.P. 19(a)(1) (applying only to parties that are "subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction."). The Department conceded early on that the doctrine of sovereign immunity prevents joinder of EPA. (App. 76, ¶ 29.) However, if the court finds that joinder is not feasible, then it performs a third step and "**must** determine whether, in equity and good conscience, the action should proceed among the existing parties, or should be dismissed." N.D.R.Civ.P. 19(b) (emphasis added). The rule then expressly prescribes the four factors that courts must consider:

> **(b) When Joinder is not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties, or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping of the relief; or
>
> (C) other measures;

> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Here, the district court failed to even consider the four Rule 19(b) factors (step 3). The district court dismissed CLR's claim under Rule 12(b)(7) because it determined that "joinder of the EPA was **required** for the Court to accord complete relief among the parties." (App. 157, ¶ 11.) (emphasis added). As discussed in detail below, the district court erred in its finding that complete relief cannot be granted in EPA's absence. *See* discussion *infra* I(b)(ii). This Court need not reach that issue, however, because the district court misapplied the law when it failed to weigh the Rule 19(b) factors to determine whether EPA was also indispensable.[3]

[¶ 36] After concluding its 12(b)(7) analysis, the district court's order mentions in passing that EPA is a required and indispensable party under Rule 19. (App. 157, ¶ 13.) However, the order fails to analyze, or even reference, any of the 19(b) factors. As further set forth in CLR's briefing to the district court, not one of the four factors is satisfied in this action. (App. 126, ¶¶ 31-40.)

---

[3] The court and parties commonly refer to the 19(b) factors as informing whether a party is "indispensable." This terminology reflects the language used in the 1990 revision of the rule. *See* Rule 19(b) (Effective Date Mar. 01, 1990; Obsolete Date Mar. 01, 2001) ("If a person as described in subdivision (a)(1) or (a)(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.") (emphasis added).

Factor (1): Granting the requested relief would neither prejudice EPA nor the existing parties – 19(b)(1)

[¶ 37] As an initial matter, if EPA was prejudiced by any change in the Department's enforcement approach, then the Department would be precluded from ever changing its interpretation of a regulation included in the SIP. Such a result would mean that the Department prejudiced EPA's rights when it recently changed its historical interpretation of the Uncontrolled Emissions Regulations. Notably, no approval from EPA was sought when the Department instituted this change.

[¶ 38] In addition, CLR's requested relief asks the district court to narrowly evaluate the plain-language of the regulation and determine whether the mere presence of an emission from a closed tank hatch or control device can, in and of itself, establish a violation of the Uncontrolled Emissions Regulation. EPA's rights would not be affected because the relief does not seek to modify the regulation that EPA approved. If relief is granted, operators like CLR will still be subject to the requirements of the Uncontrolled Emissions Regulation.

[¶ 39] Furthermore, granting CLR's requested relief would not prejudice EPA because it is wholly consistent with EPA's enforcement approach. In *U.S. v. Slawson*, EPA initiated an enforcement action that included a violation of the Uncontrolled Emissions Regulation. *U.S. v. Slawson Exploration Company, Inc.*, Case No. 16-cv-00413 (U.S. Dist. Ct., Dist. Of ND, Dec. 1, 2016 ("Slawson"). Unlike the Department's recent enforcement approach, EPA did not simply rely on the mere presence of emissions as observed in photographs and video (but neither quantified nor speciated) to establish a violation. Rather, EPA's Complaint in Slawson expressly

references that it completed "further investigation" of Slawson's engineering practices, normal operating pressures, and the pressure settings on its hatches:

> Further investigation indicated that Slawson had failed to conduct a formal engineering analysis to ensure that its vapor control systems were adequately designed to route all storage tank vapors to emissions control devices. In many cases, the storage tanks were connected to systems that were not adequate to route all vapors from the storage tanks to emissions controls, forcing vapors to be emitted directly to the atmosphere from thief hatches on tanks.

See Complaint, *Slawson*, Case No. 16-cv-00413 at ¶¶ 54-55. EPA confirmed this view as recently as November 2018 in a letter of interpretation in which it stated that cameras that do not quantify the level of emissions do not establish non-compliance without further analysis. (App. 156.) ("…[I]nfrared camera technology is useful for inspections of volatile organic compound (VOC) emission sources….While these cameras can verify whether VOC losses from storage tanks are occurring, the FLIR cameras currently in use by EPA do not quantify the magnitude of the losses. Instead, inspectors use the camera to observe emissions and evaluate *potential* regulatory non-compliance. This process considers the infrared images as one element of the analysis.") (underlined emphasis added).

[¶ 40] EPA's approach is consistent with the plain language of the regulation and consistent with CLR's requested relief in this action. Granting the requested relief would have no impact on EPA' ability to initiate an enforcement action similar to Slawson and, therefore, it would not prejudice EPA in any manner.

Factor (2): the limited nature of the relief avoids any prejudice – 19(b)(2)

[¶ 41] CLR has requested relief in this action that avoids any potential prejudice to EPA. The relief does not ask the district court to impose additional obligations on the Department short of what is plainly already required by the regulation approved by EPA.

Two cases cited by the Department in its Motion to Dismiss Brief in briefing to the district court, *EEE Minerals, LLC v. State*, 318 F.R.D. 118 (D.N.D. 2016) and *Statoil Oil & Gas LP v. Abaco Energy, LLC*, 2017 ND 148, 897 N.W.2d 1 demonstrate that the federal government's property interest may be prejudiced by a property title action decided in the government's absence. The Department also cited *California Dump Truck Owners Ass'n v. Nichols*, in which the requested relief attempted to enjoin all state enforcement based on federal preemption of the rule in question. 784 F.3d 500 (9th Cir. 2015). These cases present very clear examples of prejudice to absent parties that are distinguishable from the present action. CLR does not seek to invalidate or even modify the Uncontrolled Emissions Regulation, and as a result, the limited nature of the relief requested easily avoids any prejudice to EPA.

Factor (3): Judgment rendered in EPA's absence would be entirely adequate – 19(b)(3)

[¶ 42] Judgment rendered in EPA's absence would be entirely adequate because it would clarify the uncertainty that the Department's new enforcement approach has created. The declaratory relief seeks to confirm the need for additional support, beyond the mere presence of emissions, to establish a violation, when those emissions emanate from fugitive emission sources at facilities with an approved and operating control device. Importantly, the judgment CLR seeks does not implicate an EPA interest because the relief is already consistent with EPA's application of the regulation. Moreover, and as discussed in detail below, CLR has no other mechanism to obtain this relief. Accordingly, the requested relief is, in fact, the *only* adequate remedy available to CLR.

Factor (4): No other adequate remedy exists – 19(b)(4)

[¶ 43] Each of the alternative remedies suggested by the Department suffer from a common flaw: CLR's requested relief does not seek to invalidate or modify the Uncontrolled Emissions Regulation. Instead, CLR's requested relief seeks only to realign the obligations of operators with the plain language of the regulation.

[¶ 44] For example, the Department claims that CLR may petition the Department to review the Uncontrolled Emissions Regulation pursuant to Section 23-01-04.1(3) of the North Dakota Century Code. That section provides that the Department shall review and potentially revise any rule that a person identifies as "more stringent than federal regulations or rules where there are no corresponding federal regulations." N.D.C.C. 23-01-04.1(3). However, CLR has not identified any such rule and does not seek for the Department to revise any rule.

[¶ 45] Similarly, N.D.C.C. § 28-32-16 provides "[a]ny person substantially interested in the effect of a rule adopted by an administrative agency may petition such agency for a reconsideration of any such rule or for an amendment or repeal thereof." Again, CLR neither seeks the reconsideration, repeal, or amendment of N.D. Admin. Code § 33-15-07-02(1), nor would the requested relief have any such practical effect. Instead, CLR has asked the court to issue a declaratory judgment based on a purely legal question of regulatory interpretation. Such a remedy is not available through the repeal or amendment of the Uncontrolled Emissions Regulation.

[¶ 46] Finally, the Department claims that CLR's opportunity to challenge the approval of the SIP in 1991 constitutes an adequate remedy. Such a remedy is wholly inadequate because CLR has not, and does not, challenge the regulation that EPA approved. The entire purpose of this action is to realign the Department's enforcement approach with the *existing* regulation.

[¶ 47] When considered, these four factors heavily favor allowing this action to proceed. However, the district court did not explain or consider these factors. As such the district court's conclusion must be reversed because it was "not the product of a rational mental process leading to a reasoned decision" and it misapplied the law. *See Hammer*, 2010 ND 152 at ¶ 26 (quoting *Citizens State Bank v.* 2010 ND 56 at ¶ 8).

ii. The District Court erred in finding that EPA was a required party because the declaratory judgment requested does not prejudice the rights of EPA.

[¶ 48] Although the district court erred in failing to consider whether EPA was an indispensable party, it also erred in its initial finding that EPA was a required party. The district court failed to fully analyze whether it could accord complete relief among the parties and erred in finding that EPA's oversight authority alone represented a material interest in this action.

[¶ 49] As described above, the first step of analysis under Rule 19 is to determine whether an absent party is required to be joined under Rule 19(a)(1)(A)-(B).

> **(a) Persons Required to Be Joined if Feasible.**
>
> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

[¶ 50] The district court determined that EPA was a required party because it could not accord complete relief among the existing parties in EPA's absence. (App. 157, ¶ 11.) The district court justified its conclusion by explaining that EPA oversees the execution of the Uncontrolled Emissions Regulation. *Id.* ("In this case, the EPA oversees the execution of N.D. Admin. Code§ 33-15-07-02(1). N.D. Admin. Code § 33-15-07-02(1) is directly at issue in the Complaint. Therefore, joinder of the EPA was required for the Court to accord complete relief among the parties.").

[¶ 51] The district court arrives at this conclusion without analyzing the effect of the requested relief on EPA, even though the nature of the requested relief is central to determining whether the court can accord such relief. CLR has asked the district court to determine that the mere presence of an emission from a closed tank hatch or control device cannot, in and of itself, establish a violation of the Uncontrolled Emissions Regulation. The district court's order suggests that it concluded that it could not make such a determination without adjusting "the rights of all parties interested," including EPA. *Wacker Oil,* 459 N.W.2d at 383 (N.D. 1990).

[¶ 52] The subject of the *Wacker Oil* case provides a useful contrast to EPA. The *Wacker Oil* case was an action to quiet title to an oil and gas leasehold estate in which not all mineral interest holders were joined. The "material interest" of the mineral interest holders in that case is evident—quieting title without the absent parties would offer only partial relief to the plaintiffs. *Id.*

[¶ 53] Here, EPA does <u>not</u> have a material interest that would be impaired by granting CLR's relief. A judgment in either CLR's or the Department's favor will not bind EPA in any way. Under the Cooperative Enforcement Agreement, EPA retains its enforcement authority under the Clean Air Act. (App. 103.) Both EPA and the Department can (and do) independently enforce the Uncontrolled Emissions Regulation.

[¶ 54] Most importantly, and as shown in *Slawson*, EPA understands much more is required than mere observation to establish a violation. EPA has no material interest in preserving a state agency enforcement approach that plainly conflicts with the regulation approved by EPA and with EPA's enforcement practice. Thus, the district court erred by finding that EPA's oversight authority alone represented such a material interest.

iii. The District Court erred in finding that EPA was a required party under the Declaratory Judgments Act because EPA's interest will not be affected by the declaration, nor will the declaration prejudice its rights.

[¶ 55] The district court also erred in dismissing CLR's action for failure to state a claim because the court failed to properly analyze whether EPA has an interest that would be affected, or a right that would be prejudiced.

[¶ 56] N.D.C.C. § 32-23-11 provides that "all persons who have or claim any interest that would be affected by the declaration must be made parties, and a declaration may not prejudice the rights of persons not parties to the proceeding." N.D.C.C. § 32-23-11. The district court reached its conclusion by applying the same reasoning it employed to find that EPA was a required party. Specifically, the court determined that EPA's oversight authority over the SIP program constituted "an interest that would be affected by the declaration, and the declaration may prejudice the rights of EPA." (App. 157, ¶ 13.)

[¶ 57] The district court's conclusion is flawed for the same reasons discussed in Section I(B)(i) (addressing the districts court's indispensable party analysis) and Section I(B)(ii) (addressing the district court's required party analysis). Specifically, EPA would not be prejudiced by CLR's requested declaration because its authority is

unaffected by the requested relief. EPA retains its authorities to independently enforce SIP-approved regulations[4], to "overfile"[5], or to issue calls for SIP revisions[6].

[¶ 58] None of these authorities would be affected by a declaration that interprets the minimum requirements necessary for a state agency to establish a violation of a state regulation. The declaratory relief requested by CLR does not seek to modify the regulation that EPA approved. If relief is granted, operators will still be subject to the same requirements of the Uncontrolled Emissions Regulation. In addition, the requested declaration cannot bind EPA's independent enforcement authority because the agency retains such authority under its Cooperative Enforcement Agreement with North Dakota. (App. 103.) Because EPA does not have a claim or interest that would be affected by CLR's requested relief, the district court's dismissal was in error.

II. THE DISTRICT COURT ERRED IN FINDING THAT IT LACKED SUBJECT MATTER JURISDICTION PURSUANT TO SECTION 307(b)(1) OF THE CLEAN AIR ACT WHEN THE ACTION SOUGHT ONLY THE COURT'S INTERPRETATION OF A STATE REGULATION.

A. Standard of Review.

[¶ 59] "Challenges to jurisdiction are reviewed de novo when jurisdictional facts are not disputed. When jurisdictional facts are disputed, however, a district court's decision on subject-matter jurisdiction involves findings of facts and conclusions of law.

---

[4] 42 U.S.C. § 7413(b).

[5] "Overfiling" refers to the filing of a suit by EPA against an alleged violator after the state has already initiated its own enforcement action alleging the same violation. (App. 103, pp. 2-3.) (providing that the Cooperative Enforcement Agreement between EPA and the Department does not "limit EPA's authority under the Clean Air Act."); 42 U.S.C. § 7413(b) (providing considerations for EPA's penalty calculation, including the "payment by the violator of penalties previously assessed for the same violation.").

[6] 42 U.S.C. § 7410(k)(5) (providing authority to require states to correct SIP when Administrator finds that the plan is "substantially inadequate to attain or maintain the relevant national ambient air quality standard.").

If the underlying facts are disputed, a court is presented with a mixed question of law and fact and [the Court] reviews the question of law de novo and the findings of fact under the clearly erroneous standard." *Lavallie v. Lavallie*, 2015 ND 69, ¶ 7, 861 N.W.2d 164 (citations omitted). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made. *S.L.W. v. Huss*, 2014 ND 169, ¶ 8, 852 N.W.2d 367. Whether the district court has subject matter jurisdiction over CLR's claim turns on the impact CLR's requested relief would have on the validity of North Dakota's SIP. As discussed in section (B), the district court did not closely examine or make any express findings of fact regarding this issue. Accordingly, the district court's decision should be reviewed *de novo*.

B. Argument.

[¶ 60] The district court erred in finding that it lacked subject matter jurisdiction subject to § 307(b)(1) of the FCAA because it failed to apply its analysis to the relief actually requested by CLR. A challenge to an interpretation of a SIP that would not invalidate the SIP is not subject to the requirements of § 307(b)(1). *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 264 F. Supp. 3d 1040, 1047 (N.D. Cal. 2017) (citing *Utah Power & Light Co. v. Environmental Protection Agency*, 553 F.2d 215, 218 (D.C. Cir. 1977).

[¶ 61] Section 7606(b)(1) of the FCAA provides, "[a] petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410...may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). Claims that seek to invalidate—or that have the practical effect of challenging—EPA's approval of a regulation in a state SIP

constitute a challenge to the Administrator's action in approving or promulgating the SIP. *See, e.g., California Dump Truck,* 784 F.3d at 507; *U.S. v. Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir. 1987); *U.S. v. General Dynamics Corp.*, 755 F. Supp. 720, 723 (N.D. Tex. 1991). However, a challenge to a particular interpretation of a SIP which would not invalidate the SIP, is not governed by Section 307(b)(1), and instead is properly considered by a state district court. *See In re Volkswagen,* 264 F. Supp. 3d at 1047 (citing *Utah Power & Light Co.*, 553 F.2d at 218).

[¶ 62] The source of disagreement between CLR and NDDH in briefing to the district court was whether CLR's requested relief would invalidate EPA's approval of the Uncontrolled Emissions Regulation. CLR has not, and does not, contest that the federal courts of appeal have exclusive jurisdiction over actions that would challenge, either expressly or practically, EPA's approval of a SIP.

[¶ 63] However, that is not the case here and the district court erred in its conclusion that CLR's requested relief would "have a practical effect of challenging the EPA's approval of the state's SIP." (App. 157, ¶ 16.) The district court reaches this conclusion without explaining what impact the requested relief, if granted, might have on the Uncontrolled Emissions Regulation. In fact, CLR's requested relief does not challenge EPA's approval of the regulation because it would not change any of the regulation's requirements with which CLR or other operators must comply.

[¶ 64] Again, the Uncontrolled Emissions Regulation provides:

> No person may cause or permit the emission of organic compounds gases and vapors, except from an emergency vapor blowdown system or emergency relief system, unless these gases and vapors are burned by flares, or an equally effective control device as approved by the department.

N.D. Admin. Code § 33-15-07-02(1). Based on its plain language, the Uncontrolled Emissions Regulation prohibits emissions in excess of a certain level, or quantity, to escape the installed control equipment. The threshold for the allowable emissions is defined by the emission level of (i) the installed flares or (ii) equally effective control devices. CLR and other operators must comply with these requirements and prevent emissions from exceeding this threshold.

[¶ 65] CLR's declaratory judgment action did not ask the district court to find that the threshold for allowable emissions should be lower than is provided for in the regulation. The determination of the proper threshold was not before the district court in any way. The precise level of the threshold is a technical issue informed by the Department, which has issued guidance on its view. (App. 25.) (articulating a view that the VOC destruction efficiency of flare should be 90 percent). Nor did CLR ask the district court to interpret the regulation in a way that would practically lower the threshold.

[¶ 66] Instead, CLR's requested relief asks the district court to determine only whether the mere presence of an emission from a closed tank hatch or control device can, in and of itself, establish a violation of the Uncontrolled Emissions Regulation. Without quantifying the level of emissions, CLR contends the Department cannot establish whether the emissions threshold has been exceeded. To restate and emphasize: finding that the mere presence of an emission from a closed tank hatch or control device cannot, in and of itself, establish a violation does not modify the threshold for allowable emissions. As such, it does not change the requirements with which CLR and other operators must comply.

[¶ 67] The requested relief in the cases cited by the district court are readily distinguishable in this regard. They involved relief that sought to completely enjoin the enforcement of the regulations at issue and would have clearly changed the requirements to which regulated entities were subject. *See Ford Motor Co.*, 814 F.2d at 1103 (contending that the EPA-approved SIP could not be enforced by the federal government because a state court consent judgment had invalidated it.); *California Dump Truck*, 784 F.3d at 507 (seeking to enjoin enforcement of a state regulation included in EPA-approved SIP, alleging it was preempted by federal law.)

[¶ 68] In briefing to the district court, the Department also cited to *General Dynamics Corp.*, a case in which the plaintiff did not seek to enjoin enforcement of the EPA-approved regulation. 755 F. Supp. at 720. However, the relief in that case would have also changed the requirements with which regulated entities would have needed to comply by allowing a calculation method that was expressly prohibited by the SIP. *Id.* (seeking an interpretation of a state regulation included in an EPA-approved SIP that would have allowed plant-wide averaging across multiple surface coating operations, when the SIP provision at issue expressly prohibited such averaging.).

[¶ 69] Importantly, granting the requested relief would not prevent EPA or the Department from asserting violations against CLR. Nor would it impact the precise emissions threshold. It would only recognize that the plain language of the regulations establishes the emissions threshold at some level above zero.

[¶ 70] The district court failed to fully analyze CLR's requested relief or the impact it would have on EPA's approval of the SIP. The requested relief would not invalidate the Uncontrolled Emissions Regulation or modify the requirements North Dakota operators are subject to. Accordingly, the district court erred in finding it lacked subject matter jurisdiction over CLR's declaratory judgment action.

III. THE DISTRICT COURT ERRED IN FINDING THAT CLR'S ACTION FOR DECLARATORY JUDGMENT WAS NOT RIPE FOR JUDICIAL DETERMINATION, DESPITE CLR'S GOOD FAITH ALLEGATION THAT THE SEEDS OF A CONTROVERSY EXIST AT HUNDREDS OF FACILITIES ACROSS THE STATE.

A. Standard of Review

[¶ 71] In reviewing an appeal from a Rule 12(b) dismissal, the Court "construe[s] the complaint in the light most favorable to the plaintiff, taking as true the well-pleaded allegations in the complaint. *Ziegelmann*, 2002 ND 134 at ¶ 5. Because determinations on the merits are generally preferred to dismissal on the pleadings, the Court views Rule 12(b)(6) motions with disfavor. *Ziegelmann*, 2002 ND 134 at ¶ 5 (citations omitted). Accordingly, the Court is deferential to the plaintiff and "the complaint should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." *Id.* The Court "will affirm a judgment dismissing a complaint for failure to state a claim if [it] cannot discern a potential for proof to support it." *Id.*

B. Argument.

[¶ 72] The district court erred in dismissing CLR's claim for declaratory relief pursuant to N.D.R.Civ.P. 12(b)(6) because CLR's claim is both ripe and justiciable. CLR's claim is ripe because it involves a purely legal question of regulatory interpretation and it is justiciable because it alleges facts upon which the court can render a judgment that will remove an uncertainty.

[¶ 73] "Any person… whose rights, status, or other legal relations are affected by a statute…may have determined any question of construction or validity arising under the…statute…and may obtain a declaration of rights, status, or other legal relations thereunder." N.D.C.C. § 32-23-02.

[¶ 74] "Although the complainant need not necessarily possess a cause of action (as that term is ordinarily used) as a basis for obtaining declaratory relief…[the party must] possess a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner." *Iverson v. Tweeden*, 48 N.W.2d 367, 371 (N.D. 1951).

[¶ 75] There are four prerequisites to obtaining declaratory relief:

> The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows: (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination…

In Interest of McMullen, 470 N.W.2d 196, 198-99 (N.D. 1991) (quoting *Iverson,* 48 N.W.2d at 370). The district court's order purports to dismiss CLR's action on ripeness grounds because it determined that CLR did not "allege any immediate threat of liability under N.D. Admin Code §33-15-07-02(1)." (App. 157, ¶ 20.) However, CLR's declaratory judgment action is ripe because it asks the court to address a purely legal question of regulatory interpretation.[7] Likewise, the concerns raised by the district court materially understate the legal jeopardy which the Department has subjected CLR to and do not render CLR's claim non-justiciable.[8]

---

[7] The Court has observed that it interprets administrative regulations under the same principles of statutory interpretation. *HIT, Inc. v. N. Dakota Dept. of Human Servs.*, 2013 ND 51, ¶ 51828 N.W.2d 792, 794. Accordingly, the policy considerations that underlie the Court's discretion in applying the exception to administrative exhaustion for questions of statutory interpretation apply equally to regulatory interpretation.

[8] The district court does not expressly conclude that CLR's claims are not justiciable. However, its order provides the legal requirements pertaining to justiciability.

The Court's decision in *Medcenter One* demonstrates that CLR's complaint states a claim for which relief can be granted.

[¶ 76] Before turning to the district court's specific errors in applying the justiciability and ripeness analyses, the Court's *Medcenter One, Inc. v. North Dakota State Bd. of Pharmacy* decision warrants particular discussion. 1997 ND 54, 561 N.W.2d 634. In that case, Medcenter One, Inc. ("Medcenter") notified the North Dakota Board of Pharmacy ("NDBP") of its plans to expand the services of one of its pharmacies. *Id.* at ¶¶ 4-5. The notice included Medcenter's view that its pharmacy would remain exempt from requirements contained in a state statute that was administered by NDBP. *Id.* NDBP's legal counsel disagreed with Medcenter's view and informed the company of its opinion that Medcenter was not exempt from the state statute in question. *Id.* The letter from NDBP's legal counsel did not initiate an enforcement action against Medcenter, but it did expressly provide the company with an opportunity for a formal hearing. *Id.*

[¶ 77] Here, the facts are strikingly similar. The Department's NOVs, emails, and argument to the district court provide a clear position as to the Department's legal interpretation of the Uncontrolled Emissions Regulation and are analogous to the letter from NDBP's legal counsel in *Medcenter*. Importantly, the facts here weigh more heavily in favor against dismissal because CLR—unlike Medcenter—does not have the opportunity to challenge the agency's interpretation.[9] Therefore, like in *Medcenter*,

[9] Even if the Department (or the newly established DEQ), at some point in the future, were to file an administrative complaint against CLR for an alleged violation that implicates the question before the district court, such action by DEQ would not divest the district court of its jurisdiction under the Declaratory Judgment Act. CLR's action involves a purely legal question of regulatory interpretation, which is both ripe and justiciable. A future administrative complaint would involve a fact-specific inquiry by the agency related to *one* instance of an alleged violation. Both legally and practically speaking, such a proceeding would not resolve the uncertainty regarding CLR's

CLR's claim for declaratory relief is appropriately considered by the district court and should not be dismissed. The *Medcenter* case serves as clear precedent that the district court can, in fact, grant the relief CLR requests. Therefore, the district court erred in dismissing the complaint, especially in light of the deferential standard of review in 12(b)(6) dismissals. *See Ziegelmann*, 2002 ND 134 at ¶ 5 ("the complaint should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted.") (citations omitted).

The District Court erred in finding that the Department's actions have no direct effect on the CLR's day-to-day business.

[¶ 78] The district court's conclusion that the Department's actions have "no direct and immediate effect on the day-to-day business" of CLR is deeply flawed and understates the significant complexity and scale of CLR's compliance obligations in North Dakota. (App. 157, ¶ 20.) As the largest operator of oil and gas production facilities in North Dakota, CLR must make state-wide compliance decisions based on its understanding of regulatory requirements. The Department's threats of enforcement action place a cloud of uncertainty over the compliance status of hundreds of CLR sites across the State. As a public company, CLR has an obligation to its shareholders to comply with the law and is required to frequently represent in mandatory public filings that it does, in fact, operate its production facilities in compliance with the law.

---

compliance status at more than 1,000 production facilities across the state. Moreover, administrative agencies do not maintain exclusive jurisdiction over questions of interpretation. Such jurisdiction is provided to the courts under N.D.C.C. § 32-23-02. ("Any person. . . Whose rights, status, or other legal relations are affected by a statute . . . may have determined any questions of construction or validity arising under the . . . statute… and may obtain a declaration of rights, status, or other legal relations thereunder.").

[¶ 79] CLR lacks an administrative procedural mechanism to mitigate this uncertainty because the Department retains the sole discretion to continue, or stall, the administrative process. It is using its unfettered ability to issue more and more NOVs, and conduct more and more inspections without prosecuting a single one for more than two years. Each inspection and NOV places CLR in greater legal jeopardy. This legal jeopardy is most directly rooted in CLR's uncertainty regarding the Department's new interpretation of the Uncontrolled Emissions Regulation, in which the Department is alleging violations based on the mere presence of emissions. The relief requested by CLR would remove this uncertainty and greatly reduce the prejudicial impact on CLR's legal interests.

[¶ 80] The removal of an uncertainty is one way in which a declaratory judgment action becomes justiciable. *See Iverson*, 48 N.W.2d at 370-71 ("In order to present a justiciable controversy under the declaratory judgments act, the complaint must allege facts upon which the court can render a judgment or decree that will terminate the controversy or remove an uncertainty.").

CLR's claim is ripe because it involves a purely legal question of regulatory interpretation.

[¶ 81] One prerequisite for a declaratory judgment action is that the claim must be "ripe for judicial determination." *Ramsey Cty. Farm Bureau v. Ramsey Cty.*, 2008 ND 175, ¶ 22, 755 N.W.2d 920. In the context of state administrative law, ripeness is a corollary to exhaustion of administrative remedies. *See Medcenter One,* 1997 ND 54 at ¶ 10. Although exhaustion of administrative remedies is generally considered a prerequisite to bringing a claim where such remedies are available and would provide adequate relief, North Dakota law recognizes two exceptions to the doctrine of

exhaustion of administrative remedies - futility and purely legal questions of statutory Interpretation. *Id.; Brown v. State ex rel. State Bd. of Higher Educ.*, 2006 ND 60, ¶ 8, 711 N.W.2d 194; *Zerr v. North Dakota Workforce Safety & Ins.*, 2017 ND 175, 898 N.W.2d 700.

[¶ 82] "[E]xhaustion of administrative remedies is not a rigid prerequisite for a statutory interpretation that does not infringe on an agency's factual decisionmaking process." *Medcenter One,* 1997 ND 54 at ¶ 12. A court may grant declaratory relief where a "case involves only the interpretation of an unambiguous statute, and does not involve any issues generally reserved to an administrative decision-maker." *Id.* at 639.

[¶ 83] CLR's requested relief asks the district court to narrowly evaluate the plain-language of the regulation and determine whether the mere presence of an emission from a closed tank hatch or control device can, in and of itself, establish a violation of the Uncontrolled Emissions Regulation. Although a favorable decision will remove a significant uncertainty that affects CLR's legal interests, it does not require the court to evaluate a factual record that is specific to CLR.

[¶ 84] The regulation in question is unambiguous. It prohibits the emission of organic compounds unless the emissions are burned by flares or an equally effective control device. N.D. Admin. Code § 33-15-07-02(1). In recognition of the fact that *some* level of fugitive emissions will inevitably escape such controls, other regulations specifically address fugitive emissions, opacity, and when such emissions violate regulatory prohibitions. *See* N.D. Admin. Code § 33-15-17; *see also* (App. 4, ¶¶ 15-17.) There is nothing ambiguous or overly technical about the straightforward language and structure of these air quality control regulations – one generally requires installation of

flares or equivalent control devices at sources of organic compounds emissions; while the other, more specific provisions address emissions which inevitably escape that control equipment, either en route to the control equipment (fugitive emissions), or as a result of incomplete combustion at the control equipment (opacity).

[¶ 85] Because the question before the court is purely legal in nature, it is ripe for judicial determination.

CLR's claim is justiciable because it has alleged facts upon which the district court can render a judgment that will remove an uncertainty.

[¶ 86] An additional prerequisite is that the claim must be justiciable. *McMullen*, 470 N.W.2d at 198–99 (quoting *Iverson*, 48 N.W.2d at 370); *Brandvold*, 2011 ND 185 at ¶ 8. "In order to present a justiciable controversy under the declaratory judgments act, the complaint must allege facts upon which the court can render a judgment or decree that will terminate the controversy or remove an uncertainty." *Iverson*, 48 N.W.2d at 370-71.

[¶ 87] Here, CLR's request for declaratory relief is justiciable because the requested relief would remove a significant uncertainty that impacts CLR's legal interest. As discussed above, CLR's legal jeopardy stems from the uncertainty caused by the Department's new interpretation of the Uncontrolled Emissions Regulation, in which the Department is alleging violations based on the mere presence of emissions. The relief requested by CLR would remove this uncertainty and greatly reduce the prejudicial impact on CLR's legal interest. Therefore, CLR's claim for declaratory relief is justiciable.

[¶ 88] Because CLR's claim is both ripe and justiciable, the district court erred in dismissing it pursuant to N.D.R.Civ.P. 12(b)(6).

CONCLUSION

[¶ 89] For the foregoing reasons, Appellant Continental Resources, Inc. respectfully requests that the Order Granting Defendant's Motion to Dismiss entered by the district court be reversed and that this action be remanded for further proceedings.

Dated this 26th day of April, 2019.

FREDRIKSON & BYRON, P.A.

By: */s/ Lawrence Bender*

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com

– and –

BRACEWELL LLP

Jason B. Hutt
2001 M Street NW, Suite 900
Washington, D.C. 20036
Telephone: (202) 828-5850
jason.hutt@bracewell.com

Matthew G. Paulson
111 Congress Ave., Suite 2300
Austin, Texas 78701-4061
Telephone: (512) 494-3659
matthew.paulson@bracewell.com

Attorneys for Plaintiff and Appellant, Continental Resources Inc.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Continental Resources, Inc., Plaintiff and Appellant, vs. North Dakota Department of Health, Defendant and Appellee.	Supreme Court No. 20190087 Burleigh County District Court Civil Case No. 08-2018-CV-02160

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

CERTIFICATE OF SERVICE

I hereby certify that on April 26th, 2019, I electronically filed the following documents:

1. Brief of Appellants Continental Resources Inc.; and
2. Appendix of Appellants Continental Resources Inc.

with the Clerk of the North Dakota Supreme Court and served by electronic mail on the following:

Margaret I. Olson
maiolson@nd.gov

FREDRIKSON & BYRON, P.A.

By: */s/ Lawrence Bender*

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com

– and –

BRACEWELL LLP

Jason B. Hutt
2001 M Street NW, Suite 900
Washington, D.C. 20036
Telephone: (202) 828-5850
jason.hutt@bracewell.com

Matthew G. Paulson
111 Congress Ave., Suite 2300
Austin, Texas 78701-4061
Telephone: (512) 494-3659
matthew.paulson@bracewell.com

Attorneys for Plaintiff and Appellant, Continental Resources Inc.

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant, Continental Resources, Inc. in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellant was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, statement of issues, signature block, certificate of service, and this certificate of compliance, totals 9,599.

Dated this 26th day of April, 2019.

FREDRIKSON & BYRON, P.A.

By: */s/ Lawrence Bender*

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com

– and –

BRACEWELL LLP

Jason B. Hutt
2001 M Street NW, Suite 900
Washington, D.C. 20036
Telephone: (202) 828-5850
jason.hutt@bracewell.com

Matthew G. Paulson
111 Congress Ave., Suite 2300
Austin, Texas 78701-4061
Telephone: (512) 494-3659
matthew.paulson@bracewell.com

Attorneys for Plaintiff and Appellant, Continental Resources Inc.